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No. 145

In the
Supreme Court of the United States
OCTOBER TERM, 1964.

THE HONORABLE MICHAEL L. IGOE, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable, The Chief Justice And Associate Justices of the Supreme Court of the United States:

Your petitioner, Michael L. Igoe, United States District Judge of the United States District Court for the Northern District of Illinois, respectfully prays this Court grant a rehearing of its denial of the Petition for Writ of Certiorari heretofore entered in this cause.

The grounds relied upon in urging this Court grant rehearing are that the petitioner had available to him other substantial grounds not previously presented to this Court

upon the Petition for the Writ of Certiorari, and the importance of those grounds have become apparent only in the light of this Court's decision in *Singer* v. *United States,* 85 S. Ct. 783, decided March 1, 1965.

This case, like *Singer* (supra) concerned, in the main, the permissibility of Rule 23(a) of the Federal Rules of Criminal Procedure, when a defendant wishes to waive his right to jury trial, and the government withholds its consent—though the Court approves the waiver.

In this case, the trial Court overruled the government's withholding of consent and ordered production of the government's evidence on trial before the Court, and upon the government's twice refusing the direction, dismissed the case for want of prosecution. The government then petitioned the United States Court of Appeals for the Seventh Circuit for a writ of Mandamus directing the trial judge to reinstate the case and impanel a jury. It was ordered that the writ issue on May 7, 1964. (331 F.2d 766). It was to review that order that this Petitioner prayed this Court to issue its Writ of Certiorari.*

Prior to the issuance of the writ of Mandamus, this Court had granted Certiorari to review the decision of the Ninth Circuit in *Singer* v. *United States,* 326 F. 2d 132. The grant of Certiorari issued on April 20, 1964.**

This petitioner borrowed from the *Singer* case the wording of its first two questions contesting the permissibility of Rule 23(a):

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* Two other questions were urged for granting the writ: 1. whether a hearing is required when fact allegations made in the Petition for Writ of Mandamus are put in issue; and 2. when jeopardy attaches in a non-jury trial.

** The grant of Certiorari in *Singer* (supra) was brought to the attention of the Court of Appeals for the Seventh Circuit by letter dated April 24, 1964.

(1) Does the defendant have the constitutional right to waive a jury trial?

(2) Does Rule 23(a) of the Federal Rules of Criminal Procedure conditioning defendant's waiver of jury trial upon consent of the government violate due process?

Petitioner urged the Court to consolidate the cases for hearing. The Solicitor General, however, in his answering memorandum, while expressing recognition of different circumstances existing in the two cases, suggested to this Court that the decision on the Petition for the Writ in this case await the decision in *Singer*. This Court apparently adopted the suggestion. *Singer* was affirmed on March 1, 1965. Certiorari was denied in this case on March 15.

The source of the substantial grounds, not previously presented for full consideration on the Petition for the Writ of Certiorari, is found in this Court's decision, in the *Singer* case, where the Court defines the defendant's only constitutional right concerning the method of trial "is to an impartial trial by jury." (85 S. Ct. at 790).

In elaboration of that right so defined, the Court indulged the recognized presumption that government officers would serve the interests of justice in the performance of their duties, and in the absence of a stated basis for the waiver of jury trial by a defendant, held that government counsel need not give any reason for withholding consent, saying, 85 S. Ct. at p. 791:

> "In upholding the validity of Rule 23(a), we reiterate the sentiment expressed in *Berger* v. *United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.ED. 1314, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim' • • •

that guilt shall not escape or innocence suffer.' It was in light of this concept of the role of prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose. We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where 'passion, prejudice • • • public feeling' or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forego jury trial other than to save time, this is not such a case, and petitioner does not claim that it is." *Singer* v. *United States,* 85 S. Ct. 783, 791.

However, in this case the defendant did state his reasons for wanting to forego jury trial and did claim the result of a jury trial would be a denial of impartiality. Upon executing the waiver, this petitioner made his statement to the Court:

"I wish to say further, Your Honor is aware that every citizen of this country must be today, whether it be Chicago, New York, the West Coast, or wherever it be, there have been a long series of articles daily in all the newspapers of the land and certainly in every Chicago newspaper dealing with groups, alleged groups of men of Italian descent.

"Your Honor is well aware that the mind of the public has been conditioned to feel and think that with

> a man being accused by the great Government of the United States of America, and he be a man with a name and be of Italian descent, that he goes to a trial before a jury without the possibility of getting an uninformed, in that respect, jury or a fair and equitable jury. He hasn't a possible chance." (App. 104-105).

The government stated no basis for withholding its consent but took the position that it had the absolute right to do so.

We respectfully submit that the "different circumstances" recognized by the Solicitor General in his answering memorandum in this case are such that "a defendant's reasons for wanting to be tried alone are so compelling that the Government's insistence on trial by a jury would result in the denial to a defendant of an impartial trial," unless equally compelling reasons dictate the withholding of the consent.

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court grant a Rehearing herein, and issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and either reverse the decision of that Court or, in the alternative, remand the cause for full hearing on the considerations upon which the respective positions regarding the method of trial of the Government and of this Petitioner rely.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN,
Attorneys for Petitioner

CERTIFICATE OF COUNSEL.

Anna R. Lavin, a member of the Bar of this Honorable Court hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay, and is restricted to substantial grounds available to Petitioner and not previously presented.

ANNA R. LAVIN